Supreme Court of the United States

October Term, 1964

No. 345

STATE OF MARYLAND for the use of NADINE Y. LEVIN, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

STATE OF MARYLAND for the use of SYDNEY L. JOHNS, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICI CURIAE BRIEF IN SUPPORT OF BRIEF ON BEHALF OF PETITIONERS

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The State of Maryland, for the use of Mary Jane Meyer, et al; the State of Maryland, for the use of Vance Lewman Brady, et al; and Capital Airlines, Inc., with leave of this Court file this, their brief amici curiae, in support of the brief of the Petitioners. The

said amici curiae are Respondents in case No. 543, *United States of America, Petitioner,* v. *State of Maryland* for the use of Mary Jane Meyer, et al., tried in the United States District Court for the District of Columbia, affirmed *United States* v. *State of Maryland*, 322 F. 2d 1009 (1963); petition for a writ of certiorari denied December 16, 1963, 375 U.S. 954; Conditional Petition for Rehearing filed by the United States out of time in June, 1964. Brady was the pilot and Meyer the copilot of the Capital Airlines airplane destroyed in the occurrence in question. The decedents, Levin and Johns, were passengers in the same airplane.

Actions were brought in the name of the State of Maryland for the survivors of Johns and Levin, passengers on the Capital Airlines plane, in the United States District Court in Pittsburgh; that Court held for the plaintiffs after the ruling of the District Court in the District of Columbia. The Government appealed and the Court of Appeals for the Third Circuit reversed in a split decision, holding for the Government (329 F (2d) 722). This decision was rendered after that of the District of Columbia Circuit Court. The Supreme Court has granted the petition of the plaintiffs for a writ of certiorari in the Johns and Levin cases.

This Court has not acted on the Conditional Petition for Rehearing which the Government moved for leave to file in the case No. 543, *United States of America* v. *State of Maryland for the use of Mary Jane Meyer, et al.,* but because the decision of this Court in the Johns and Levin cases conceivably could have a bearing on the ultimate disposition by this Court of the Conditional Petition for Rehearing in the Brady,

Meyer and Capital Airlines cases, the plaintiffs in those cases asked leave to file this brief as amici curiae in support of the brief of the petitioners, Levin and Johns, and this Court granted that prayer.

The plaintiffs in case No. 543, State of Maryland for the use of Meyer, and for the use of Brady, and Capital Airlines, hereafter, for the sake of brevity, referred to as amici curiae or the Meyer cases, believe the following questions are presented:

1. Are civilian caretakers of federal property employed on a full time basis under the authority of 32 U.S.C. § 709(a), employees of the United States under the provisions of the Federal Tort Claims Act?

2. If such civilian caretakers are employees of the United States within the meaning of the Federal Tort Claims Act (and the Government admits that McCoy was employed pursuant to the authority granted by 32 U.S.C. § 709(a)), then did the United States have sufficient right to control its said employee at the time of the occurrence in question so that the United States, if a private person, would be liable under the respondant superior law of Maryland for his negligence?

STATEMENT OF THE CASE

a. The Occurrence

The actions arose out of a mid-air collision between a Capital Airlines Viscount Airliner and a T-33 jet airplane owned and maintained by the United States and allocated to the Maryland Air National Guard. The collision occurred on Tuesday, May 20, 1958, over the State of Maryland, while the Viscount was proceeding on a regularly scheduled commercial flight from Pittsburgh to Baltimore Friendship Airport on

a civil airway. The T-33 airplane was being operated by one Julius R. McCoy on a local area flight out of Martin Airport, Baltimore, Maryland.

b. The Employment Relationship

The United States owned and provided the airplanes, paid the cost of the fuel used by all the airplanes allocated to the unit, including the T-33 Airplane involved, provided all the equipment for the Guard Unit, paid the salaries of the civilian personnel to maintain said federal property, furnished the new and spare parts required for the said equipment, and made the major repairs needed by the T-33 airplane involved and the other planes allocated to the Guard Unit.

On the date of the accident, McCoy was employed as a full-time civilian air technician under the provisions of 32 U.S.C. § 709(a), which provides for the employment of civilian caretakers of United States property. He was also a commissioned officer in the Air National Guard of the State of Maryland.

The Federal Government found it necessary to employ civilian personnel to protect and maintain its property which was allocated for use by National Guard Units. This included materiel, armament and equipment, and in the present case, the airport, hangars, runways, jet airplanes, trucks, etc.

The National Guard Bureau is authorized to regulate employment and rates of compensation of civilian caretakers of federal property; Department of the Army General Order 96, dated November 9, 1951, 32 U.S.C. § 32 (which became 32 U.S.C. § 709(a)).

Pursuant to 32 U.S.C. § 709(a), the Secretary of the Air Force, through the National Guard Bureau, pro-

mulgated Air National Guard Regulation 40-01, dated 20 December, 1954 (hereinafter referred to as ANGR 40-01), which provided that the basic authority for employment of National Guard civilian personnel is contained in Section 90 of the National Defense Act, as amended (which became 32 U.S.C. § 709(a)). This authority of the federal government to employ, fix rates of pay, establish work hours, supervise and discharge employees, within the purview of this regulation, was delegated by the Secretary of the Air Force to the Adjutants General of the several states, subject to provisions of law and such instructions as might be subsequently issued by National Guard Bureau. ANGR 40-01 and Air National Guard Manual 40-01, designated the jobs in the air technician categories and prescribed the duties and requirements of the job and the prerequisite training for such employment (R. 655-660; District Ct. Finding 5, R. 693).

Under the authority of ANGR 40-01, the National Guard Bureau promulgated Air National Guard Manual 40-01, dated 1 March 1958 (hereinafter referred to as ANGM 40-01), which states that its provisions will govern all Air National Guard civilian employees (R. 211). Said manual further provides that the "authority of the National Guard Bureau to regulate the employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November, 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for All Caretakers and Clerks in the National Guard Bureau'" (R. 214; Dist. Ct. Finding 6, R. 693).

Air technicians such as McCoy are full-time civilian personnel who are placed at National Guard installations by authority of federal statutes and regulations

to maintain federal property (including highly complex and valuable jet aircraft) and records, to the prescribed standards of the Air Force, that cannot be maintained by the normal personnel assigned to the Guard Units. In order to qualify as an air technician (caretaker) under the provisions of ANGR 40-01, McCoy attended a nine month course for maintenance officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois. (R. 42). He was required to attend the school at Chanute by order of the Secretary of the Air Force. While attending this school, he was paid by the United States Air Force finance office (R. 43; Dist. Ct. Finding 7, 693).

At the time of the occurrence, in addition to carrying out his duties as Aircraft Maintenance Chief, McCoy was acting Maintenance Supervisor for the Base in the absence of Major Mitchell, who held this assignment but was away on a training program. (R. 40, 48, 71; Dist. Ct. Finding 11, R. 694).

In these positions McCoy was required to supervise the maintenance of twenty-eight aircraft, and of all other equipment allocated to the Maryland Air National Guard by the United States, in accordance with Air Force Regulations, and also to supervise the seventy-five to eighty civilian maintenance personnel who maintained the equipment (R. 37, 38, 40, 47, 68).

To insure that the unit operated the equipment in accordance with standards prescribed by the United States Air Force, an Air Force adviser on active duty with the United States Air Force was stationed at Martin Field. If he were dissatisfied with the maintenance situation, the adviser would so report to the

Air Force (R. 330; Dist. Ct. Finding, R. 694). In addition, McCoy was required to submit monthly reports respecting the equipment to the National Guard Bureau (R. 43).

United States Air Force Inspection Teams made inspections to determine whether the air technicians were complying with the requirements of ANGR 40-01. These inspections were made annually to determine whether the technicians were qualified to continue to hold their jobs (R. 307; Dist. Ct. Finding 10, R. 694).

If the United States found that a civilian employee of an Air National Guard Unit was not meeting the United States Air Force requirements, it could, in practical effect work his discharge by stopping his salary (R. 335; Dist. Ct. Finding 10, R. 694).

As an air technician, i.e., in his civilian capacity, McCoy was employed at the base during the normal work week from 8:00 A.M. to 4:30 P.M., Tuesday through Saturday, except for two Saturdays a month. On those two Saturdays, he was employed in his military status as an officer in the Air National Guard and as Squadron Maintenance Officer (R. 38; Dist. Ct. Finding 13, R. 695).

McCoy, in his full-time air technician job, was paid an annual salary in the sum of $7,500.00, by check drawn on the United States. Additionally, he was paid approximately $2,000.00 per year by the United States, for his part-time military duties (R. 41; Dist. Ct. Finding 23, R. 697).

c. Purposes of the Flight by McCoy on the Day of the Occurrence

On the morning of Tuesday, May 20, 1958, a day during which he normally worked in his civilian capacity as an air technician, McCoy reported to the base and commenced work at the usual starting time on his full-time civilian caretaker job as aircraft maintenance chief (R. 67, 68; Dist. Ct. Finding 26, R. 697), and as acting maintenance supervisor in Major Mitchell's absence (R. 77-78). Before the flight, he performed certain daily administrative duties to establish the order of business for the day. This work included the determination of which aircraft would be maintained and gotten ready for flight or repair, if necessary, and the work assignments of various individuals (R. 67, 78). At the time of the occurrence, McCoy was flying in his civilian capacity as a caretaker of government property (R. 80; Dist. Ct. Finding 34, R. 699). On the day of the occurrence, he was recorded as present at the base in his civilian capacity, was carried on the roster in his air technician pay status, and was paid by the United States Treasurer in this capacity (R. 77-78; Dist. Ct. Finding 26, R. 697-698).

McCoy's status as acting maintenance supervisor and aircraft maintenance chief made it desirable for him to make frequent aerial flights (R. 58, 59, 70-71, 81, 164, 306, 605-606). This was an important facet of his civilian work in maintenance (R. 75-77, 79, 164). As an air technician-aircraft maintenance supervisor, one reason for this flight or any flight that he made on this job was to insure the proper maintenance of the equipment over which he had general supervision (R. 69, 75-76). While flying he could better observe

from the air (a) obstructions that might be on the runway; (b) exposed lips of runways that might cause an accident; (c) foreign object damage; (d) cleanliness of his ramp (a piece of wire on the runway or ramp can be sucked into and ruin a $100,000.00 jet engine); (e) condition of the airport; (f) efficiency of the tower personnel; and (g) whether the maintenance people are in front of the intake scoop when the aircraft is parked, and whether they are waiting until the plane stops before they insert the chocks. (R. 140). McCoy as Maintenance Supervisor, in the course of each flight, by the very nature of his function and duty, would be observing the product he was required to maintain for better maintenance, safer aircraft, etc. (R. 164) In short, whenever he flew he could get a better appreciation of the way the people under his supervision were doing their job. (Dist. Ct. Finding 20, R. 696).

While the job description of the aircraft maintenance chief's position set forth in the civilian personnel manual, ANGM 40-01, contains no requirement that the holder of the position be a pilot or that he fly aircraft, the job description for the position of maintenance supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft" (R. 217; Dist. Ct. Finding 18, R. 696). It is desirable for the maintenance officer to have a flying status to better understand the quality of the maintenance and the condition of the equipment (Dist. Ct. Findings 16, 17, 18 and 19). General Wilson, head of the federal agency responsible for the promulgation of ANGM 40-01, and Kilkowski, McCoy's immediate superior in his civilian technician job, both testified

it was desirable for the head of the maintenance section to have a flying status, as the equipment can only be properly evaluated by flying it, and his flying the planes would give the other pilots a safer feeling because they would know that the person maintaining the plane was also flying it. Such flights by the maintenance supervisor would make for better maintenance, safer aircraft, and as a result, a better unit (R. 164). It was also part of McCoy's duties in his air technician civilian job to fly functional check flights (R. 75-77, 79, 81; Dist. Ct. Finding 20, R. 696).

McCoy also flew the airplanes to satisfy the requirements of Air Fore Regulations (AFR 60-2) and to increase his pilot rating. Since he had to maintain proficiency as a pilot in order to be qualified and competent to perform these flights, even flying for proficiency related to and was a vital part of McCoy's civilian job. (Dist. Ct. Finding 20, R. 696). During the course of the flight in question, McCoy checked the efficiency of the equipment and evaluated the quality of the maintenance (R. 162-64, 493-495; Dist. Court Finding, 21. R. 697). He watched the instruments and observed that the plane was behaving properly. He likewise had a better opportunity to observe the quality of the maintenance by flying the plane. (R. 70, 399).

The particular flight at the time of the accident was part of McCoy's function to maintain proficiency and maintain the equipment (Dist. Ct. Finding 22, R. 697). It was not a training mission (R. 80, 121, 136, 146-47, 152-53, 161-63, 586-87). The uncontradicted evidence showed that the form used for this flight was the same one used for all flights regardless of the nature of the flight, so that this form would have been used in the

case of flights made in connection with the maintenance of the plane (R. 69). While it was necessary for a person to have a military pilot's rating in order to fly a United States military plane, a person flying a plane might be performing his civilian duties as McCoy was doing on the occasion in question, and as he had frequently done on prior occasions. (R. 162-164).

McCoy could only occupy one pay status at a time, either that of a civilian caretaker in maintenance work, or that of a member of the Air National Guard in a military capacity (R. 586-87; Dist. Ct. Finding 24, R. 697). In May, 1958, at the time of the accident, McCoy had accumulated more than the number of hours for which he could earn flight pay under the provisions of AFR 60-2 for the period in question. His flight on May 20, 1958, therefore, was not to earn flight pay (R. 70, 135-36; Dist. Ct. Finding 25, R. 697).

McCoy applied to Kilkowski for permission, and received it, to make the flight on May 20, 1958. Kilkowski, like McCoy, was a civilian caretaker employed under 32 U.S.C. Sec. 709(a), and held the air technician position of base detachment commander; Kilkowski was also a member of the Maryland Air National Guard. (R. 683, Dist. Ct. Finding 14, R. 695). The flight was termed a "proficiency flight." Proficiency flights have multiple purposes, including evaluation of maintenance of the equipment, which was a responsibility of McCoy in his employment under 32 U.S.C. Sec. 709(a), Dist. Ct. Finding 20, R. 696).

McCoy was accompanied on the flight in qeustion by a passenger, Donald Chalmers. Chalmers was required to sign a release prior to the flight, releasing the United States and the State of Maryland from any

liability in the event of Chalmers injury or death, during the flight because of "negligence, faulty pilotage, or structural failure of the aircraft." (Dist. Ct. Findings 15, 28, R. 695-698).

d. Circumstances Subsequent to the Accident Establishing the Employment Relationship

Subsequent to the occurrence, McCoy received benefits under the provisions of the Federal Employees' Compensation Act, 5 U.S.C. § 751, which provides for payment of compensation by the United States to an employee of the United States injured "while in the performance of his duty." The papers pertaining to McCoy's compensation claim were processed by Col. Ebaugh, United States Property and Fiscal Officer for the State of Maryland, a Federal employee. The forms needed for the claim were provided by the Department of Labor and used in all instances for Caretakers-Technicians (R. 240-241). Col. Ebaugh in the course of his employment by the United States and pursuant to his duty to correctly certify the capacity in which McCoy was working, certified as follows:

> "I certify that Julius R. McCoy was working as a Civil Employee of the United States at the time of injury and *not* as a member of the Maryland National Guard." (R. 228).

This certificate was required by the United States Department of Labor and Col. Ebaugh's investigation led him to believe that he was justified in filling out this certification (R. 245).

The Bureau of Employees Compensation, Department of Labor, handled this case in the same manner as cases involving other employees of the United States Government. Its employees processed the claim of

McCoy and adjudicated that he was in the performance of his duty as an employee of the United States at the time of the accident.

Subsequently, at the request of the United States, and pursuant to Statute, McCoy executed an assignment to the United States under the provisions of the Federal Employees' Compensation Act, of his rights of action against Capital Airlines and others and said assignment, prepared by the United States, stated that he was employed by the Department of the Air Force as an Aircraft Maintenance Chief (Pilot) at the time of the occurrence (R. 225-227). The United States at no time offered testimony to show that a mistake or error was made by either Col. Ebaugh or the Department of Labor.

e. The Air National Guard

The overall purpose of the National Guard is to provide a pool of combat ready reserve forces to be used in case of a national emergency involving the defense of the United States; 32 U.S.C. Section 102.

The Air National Guard operates at large without regard to state boundaries. According to Standing Operating Procedure No. 3, promulgated January 2, 1957 (Defendant's Ex. 3) (R. 663-664), the local flying area for the 104th Fighter Interceptor Squadron over which flights were made daily by the squadron McCoy was a member of, included the States of Maryland, Pennsylvania, New Jersey, Delaware and Virginia. The squadron's overall training area was considered to be in the continental United States (R. 690).

The Air National Guard had some twenty-four wings of which seventy-three squadrons were equipped

with jet fighters. All of these units had a D-Day mission with a major command in the Air Force (R. 321).

The 104th Fighter Interceptor Squadron was part of the air division at Andrews Air Force Base. As such, it had been given a D-Day mission with the Air Defense Command in the role of fighter interceptor squadron for which it was trained and equipped. In case of emergency or requirement by the Air Force, the 104th was required to be able to get at least fifty percent of its aircraft fully armed in the air in the first hour (R. 333).

SUMMARY OF ARGUMENT

A. These cases were appealed to the Third Circuit on the questions (1) whether McCoy at the time of the airplane accident was an employee of the United States, and (2) was the right of the United States to control him at the time of the occurrence such that the United States, if a private person, under the respondeat superior law of Maryland would be liable for his negligence under the Federal Tort Claims Act. These issues had been previously resolved in the United States District Court for the District of Columbia on the same record in suits brought by the estates of the pilot and copilot of the Capital plane, and by Capital for its destruction.

While the appeal was pending in the Third Circuit, the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of its District Court which had in the meantime been followed by the United States District Court in Pittsburgh. The action of the District of Columbia Circuit, as well as the denial of certiorari by this Court, were brought

to the attention of the Third Circuit before it rendered its split decision.

Since the cases here were brought on behalf of the estates of two passengers riding on the Capital plane and since the identical issues of fact and law had been previously heard and disposed of on their merits in the District of Columbia, the Third Circuit was required to folow the decision of the District of Columbia Circuit under the doctrines of res judicata and collateral estoppel, and to give full faith and credit to the previous decision.

The trial courts in the District of Columbia and in Pittsburgh, and the Court of Appeals for the District of Columbia Circuit, correctly determined and applied the respondeat superior law of Maryland to the factual situation in these cases, and held that the United States, if a private party, would have been liable under the law of Maryland for the negligence of McCoy at the time of the occurrence. The Third Circuit erred in disregarding the findings of the trial court, in making its own findings not warranted by the evidence, and by citing and relying on Maryland cases which factually and legally were not pertinent.

B. Julius R. McCoy was an employee of the United States acting within the scope of his employment within the purview of the Federal Tort Claims Act at the time of the occurrence. Every Court of Appeals which has considered the question (except the Third Circuit) has held by reason of the extent of control the United States has over civilian caretakers, that they are employees of the United States.

The question of scope of employment is resolved by a consideration of the evidence under the applicable

law of Maryland, the place where the negligence occurred; *Williams* v. *United States*, 350 U.S. 857 (1955). The abundant evidence on this point is aided by the strong presumption under the law of Maryland, that the United States owned and maintained plane was being operated by its employee acting within the scope of his employment at the time of the accident.

Additionally, there were significant admissions made by the United States (1) through an acknowledged employee, Colonel Ebaugh, on active duty for the United States as United States Property & Fiscal Officer for the State of Maryland, and (2) by the Bureau of Employees Compensation Commission that McCoy was acting as an employee of the United States when injured.

C. Finally, if it can be concluded despite the evidence and presumptions to the contrary that McCoy was in the plane solely in his military capacity and doing military work only as a member of the Air National Guard of Maryland, then because of the dual relationship and control in both the Federal and State governments over such units and their members, he should be regarded as an employee of the United States whether the unit had been ordered to so-called "active" duty, or not.

ARGUMENT

I. THE FINAL JUDGMENT IN UNITED STATES v. STATE OF MARYLAND FOR THE USE OF MARY JANE MEYER, ET AL., CASE NO. 543 IS A BAR TO THE DEFENDANT'S RELITIGATING THE IDENTICAL FACT AND LEGAL QUESTIONS.

Where a litigant has had his day in court, and has received a full and fair hearing on the merits, and a final judgment has been rendered against him on issues heard and determined in that case, the requirements of due process have been satisfied and that litigant should not be permitted to try again in another case or cases arising out of the same occurrence the identical issues of fact and to re-argue identical questions of law.

The three actions instituted in the District of Columbia were brought by the estates of the pilot and co-pilot of the Capital Airlines plane, and on behalf of Capital for the value of the plane destroyed in the fatal accident. The two cases brought in the State of Pennsylvania were by the estates of two passengers in the Capital plane killed in the same accident. The identical issues of employment and scope of employment of McCoy, the pilot of the United States owned plane, were adjudicated, first in the District of Columbia and then again in Pittsburgh. The Federal Court for the Western District of Pennsylvania followed the decision of the District of Columbia District Court on these issues but the Third Circuit declined to follow the decision of the District of Columbia Circuit which had subsequently affirmed the District Court on the critical issues. In both the District of Columbia Circuit and in the Third Circuit, the United States urged precisely the same points to wit: that McCoy was not an employee of the United States at the time of the accident, nor was he within the scope of em-

ployment of the Federal Government within the purview of the Federal Tort Claims Act. The District of Columbia District Court heard the oral testimony of the key witnesses on these issues, considered the depositions which were a part of the record, and found against the United States. Thereafter, in Pittsburgh, the Government offered no additional evidence and the Pennsylvania Court, after considering the same record, followed the District of Columbia Court.

It is thus a fact that the issues decided in the prior adjudication in the District of Columbia were identical, that a final judgment was rendered on the merits and that the United States of America was the defendant in both law suits. The Third Circuit therefore was required to follow the decision of the District of Columbia Circuit under the doctrines of both res judicata and collateral estoppel.

Chief Justice Warren in *Lawlor* v. *National Screen Service, Corp.*, 349 U.S. 322 (1954), pointed out the basic distinction between the doctrines of res judicata and collateral estoppel and said as follows:

> "* * * The basic distinction between the doctrines of res judicata and collateral estoppel, as those terms are used in this case, has frequently been emphasized. Thus under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit * * *"

Many courts have abandoned the requirement of mutuality and have confined the requirement of privity

to the party against whom the plea of res judicata is asserted. *Bernhard* v. *Bank of America Nat. Trust & Sav. Ass'n.*, 122 P. 2d 892, 19 Cal. 2d 807 (1942). The requirement of mutuality must yield to public policy for to hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one. *Coca-Cola* v. *Pepsi-Cola Co.*, 172 A. 260, 36 Del. 124 (1934). All that due process requires is that the party who is now being bound was a party to the earlier judgment. It does not give the party the right to litigate the same question twice. *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25 (1916). And see *Davis* v. *McKinnon & Mooney*, 266 F. 2d 870 (6th Cir., 1959).

This court has had occasion many times to examine the nature of the doctrine of res judicata. In *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U.S. 89, (1953), Justice Reed stated:

> "We have often held that under the doctrine of res judicata a judgment entered in an action conclusively settles that action as to all matters that were or might have been litigated or adjudged therein. But a prior judgment between the parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered'. This latter aspect of res adjudicata is the doctrine of collateral estoppel by judgment established as a procedure for carrying out the public policy of avoiding repetitious litigation."

Cromwell v. *County of Sac., State of Iowa*, 96 U.S. 51 (1877); *Southern Pacific Railroad* v. *United States*, 168 U.S. 1, 49 (1897).

United States v. *United Air Lines, Inc.*, 216 F. Supp. 709, 725-729 (1962), affirmed and approved in *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379 (1964), in discussing the rationale of the holding that United Air Lines was collaterally estopped, pointed out (p. 729) that the case had already been "litigated to the hilt * * *" and that United Air Lines "not only failed to indicate that it has any new, different or additional evidence, but it has also affirmatively indicated that it has none." This precisely describes what occurred in the Meyer case where the Government asked for and by agreement of counsel received a separate full trial on the issue of agency before any further question was considered in the case. And the evidence in the Levin and Johns cases was identical with the evidence in the Meyer case because the trial in Johns and Levin was based entirely on the record in the Meyer case.

As the Court said in the *United* case, p. 728:

> "It would be a travesty upon that concept ('in the interest of justice') to now require these plaintiffs who are the survivors of passengers for hire on the United Air Lines plane to again re-litigate the issue of liability after it has been so thoroughly and consummately litigated in the trial court in the 24 consolidated cases tried at Los Angeles. * * * The defendant has had its day in court on the issue of liability before a jury."

The constitutional and statutory provisions requiring full faith and credit articulate and implement the dictate of public policy "that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522 (1930).

Confronted with the problems of res judicata and collateral estoppel the respondent United States of America in its reply memorandum to the petition for certiorari (Footnote, p. 4) stated:

> "It is not clear whether the two courts placed their decisions on precisely the same facts".

Nothing, it is submitted, could be clearer from the records in the two cases.

It is respectfully suggested that there is every good reason for applying the doctrine of collateral estoppel in these cases and holding that the decision on the questions of agency and scope of employment heard, litigated and decided in the cases in the District of Columbia, is res judicata on those issues with respect to which the defendant had the opportunity to be heard and was in fact heard in the Meyer cases. To hold otherwise, to allow the Government to go on litigating these same questions, in other circuits using the identical evidence and the same arguments as to the law, after there has been an adjudication on these questions adverse to the Government's contentions, is in derogation of the binding effect and authority that should attach to final judgments rendered by a court after a full hearing and a decision on the merits on questions of fact and law.

II. PERSONS EMPLOYED AS "CARETAKERS" OF FEDERAL PROPERTY UNDER THE PROVISIONS OF 32 U.S.C. § 709 (a) ARE EMPLOYEES OF THE UNITED STATES WITHIN THE PURVIEW OF THE FEDERAL TORT CLAIMS ACT.

Every court of appeals which has considered the question, other than the 3rd Circuit in the present case, has held that a caretaker of federal property employed under the provisions of 32 U.S.C. § 709 (a) is an employee of the United States within the purview

of the Federal Tort Claims Act; *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2nd Cir. 1956); *United States* v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957); *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1962), cert. denied, 373 U.S. 911 (1963).

In each of the above cases, the court held that a federal statute creates the position of unit caretaker and outlines his duties generally; that the pay for his services is wholly from federal funds; that federal regulations define the duties and responsibilities of the caretaker in detail; that the Secretary of the Army (Air Force) fixes the maximum pay scales, and then delegates to the adjutant general of the state the task of setting actual rates of pay, within limits fixed by federal regulations; that the primary duties of caretakers are the care and maintenance of federal property allocated by the United States to the National Guard for military purposes; that the Secretary of the Army (Air Force) through the Chief of the National Guard Bureau and through the state adjutant general to whom certain powers have been delegated, has the full right to control the employment, work and discharge of the caretaker; and that the federal government has the right to direct and control the method and means by which a caretaker performs his service.

The Secretary of the Air Force could not delegate an authority which he did not in fact have, and the authority to employ, fix rates of pay, establish duties and work hours and to discharge an employee covers every essential test of the employer-employee relationship. Any authority the adjutants general exer-

cised in this area was only authority delegated to them by the person who had it, and even then it was used subject to federal control and instructions issued from time to time from the National Guard Bureau in the Pentagon.

The National Guard Regulations No. 75-16, dated December 29, 1947, expressly state that the National Guard civilian personnel referred to are employees authorized under § 90 of the National Defense Act for administrative and accounting duties, maintenance repair and inspection of materiel, armament, vehicles and equipment provided for the National Guard by the Federal Government. The Air Force then promulgated the Air National Guard Manual governing civilian personnel, which provided for the jobs McCoy held at the time of the occurrence, as base maintenance supervisor and as aircraft maintenance chief. McCoy was the only officer maintenance supervisor of aircraft maintenance at the Base at the time of the occurrence available to perform the necessary task of flying the aircraft to evaluate the equipment maintenance and he had general supervision over the maintenance of all federal equipment including airplanes allocated to his unit. He flew the airplanes to evaluate the quality of the maintenance work performed on them, and also flew functional check flights while working in his civilian maintenance status.

The brief of the petitioner sets forth in the Appendix numerous federal regulations illustrating the scope and nature of federal supervision and control over its civilian caretakers.

These factors have satisfied all courts of appeals (other than the 3rd Circuit in the instant case) that the status of a caretaker as a civilian employee of the

United States is clearly distinguishable from that of a military member of a non-activated National Guard Unit. And the 3rd Circuit, in *O'Toole* v. *United States,* 206 F. 2d 912 (1953) had unequivocally approved the rationale in the *Holly* and *Duncan* cases, supra (p. 916).

It has been shown that the term "employees of the Government," as used in the Federal Tort Claims Act, 28 U.S.C. § 2671, is very broad, and as has been indicated, the Act is to be liberally construed.

When the Department of Justice presumably was expressing its nonpartisan views on this question, Deputy Attorney General Walsh, on May 23, 1960, advised the Senate Committee on the Judiciary that proposed legislation which would have amended the Federal Tort Claims Act to expressly include caretakers as employees of the United States was unnecessary because "an unbroken series of court decisions" had held the Federal government was responsible for the torts of caretakers "because of the control relationship between such persons and the Federal Government." (Opinion of District of Columbia Court of Appeals, Petition of United States for Writ of Certiorari in *Meyer,* No. 543, Appendix A, 8a, 9a, n; Hearings on S. 1764 before the Senate Committee on Judiciary 86th Congress, 2d Sessions (1960)).

III. PRIOR TO THE DECISION OF THE THIRD CIRCUIT IN THE LEVIN AND JOHNS CASES, THE LOWER COURTS HAD CORRECTLY INTERPRETED AND APPLIED THE RESPONDEAT SUPERIOR LAW OF MARYLAND IN THESE CASES.

Assuming that all courts which so held were correct in concluding that a "caretaker" employed under 32 U.S.C. § 709 (a) is an employee of the United States, then the question whether the employee was acting within the scope of his employment, at the time of

the occurrence, so that the Federal Government, if a private person, would be liable to the claimant is answered by a consideration of the evidence under the applicable law of Maryland, the place where the negligence occurred; *Williams* v. *United States,* 350 U.S. 857 (1955).

McCoy was performing his civilian work when flying the airplane during his civilian work week as a part of his job as a maintenance supervisor. The District of Columbia Court, in its findings, indicated that it concluded and found that McCoy was performing part of his work and duties as civilian maintenance supervisor while flying the airplane (R. 687). Fair evaluation of all the testimony on the subject by Gen. Wilson, Col. Kilkowski and McCoy, and of the applicable Order, Regulations and Manuals of the U.S. Air Force, lead inescapably to the conclusion that flying the airplane to determine the quality of maintenance work done on it was an indispensable part of the work of maintenance of airplanes, and that Captain McCoy, with a flying status, and as the only qualified officer in a supervisory maintenance position on the base at the time, was the proper person to do that work.

All aircraft maintenance is designed to prevent a malfunction from occurring rather than merely to correct or repair a malfunction after it has occurred. It is this preventive maintenance program with respect to aircraft that is so important. Evaluation of maintenance work was more than an incident of McCoy's employment, it was one of the most significant aspects of it.

The need for such preventive maintenance is immediately apparent when we consider the nature of the

operation of the aircraft and the fact that a malfunction while flying along at an altitude of 20,000 feet cannot be corrected or repaired in the same manner as repairing a defect in an automobile which occurs while it is traveling on a highway or repairing a defect in a rifle or tank or gun which occurs while it is in use. Even a small defect in a part or a minor oversight in maintenance can cause aircraft to crash to the ground with catastrophic results in death and destruction to persons and property on the ground, as well as all those in the aircraft. The most careful and painstaking program of check and inspection of the aircraft and all its components is, therefore, necessary in order to detect an abnormal condition before it results in a tragic accident. No matter how carefully done, ground inspection of the highly complicated machinery of jet aircraft does not always give the complete picture. It is only by operating the machinery, which in the case of a jet aircraft, means flying it, that the quality of its maintenance can be truly determined. McCoy, as Maintenance Supervisor, was charged with the responsibility in his civilian caretaker capacity of maintaining all the aircraft and equipment at the base. In order to qualify him for his highly technical duty, he had undergone an intensive nine-month course in aircraft maintenance. He was the only officer maintenance supervisor on the base with highly trained knowledge in this special field, and with capability of performing this duty. He was not a mechanic whose only function was to perform repairs. His prime function was to supervise the entire base maintenance program on aircraft and in order to carry out this function, he necessarily had to operate and fly the planes to check the quality of the maintenance of the aircraft under his supervision.

A fair analysis of the evidence discloses that McCoy was flying either solely in his civilian air technician status or in a dual capacity as a military pilot (because he needed the pilot's license to fly the plane) and as a civilian air technician at the time of the accident (R. 79, 80, 118, 587, 588). And he was then doing the work of an air technician in a supervisory position (R. 70, 79, 80, 121, 137, 138, 139, 140). McCoy was not in a flying training period at the time of the accident. (R. 80, 121, 136, 146, 147, 152-153, 161-163, 167, 586-587). He was flying a United States owned airplane, 32 U.S.C., Sec. 710(a).

The test as to whether the relationship of master and servant exists under the law of Maryland is the "right to control," *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957).

Under Maryland law, there is a presumption that the operator of a vehicle is the agent, servant, or employee of the owner thereof. The presumption is rebuttable. *Keitz, supra; Fowser Fast Freight* v. *Simmont,* 196 Md. 584, 588, 78 A. 2d 178 (1946); *Pennsylvania R.R.* v. *Lord*, 159 Md. 518, 151 A. 400 (1930).

Under the law of Maryland, it is also presumed that the agent, servant or employee was operating the vehicle within the scope of his employment. This presumption may also be rebutted, but only by satisfactory evidence to the contrary. *Brown* v. *Bendix Aviation Corporation,* 187 Md. 612, 621, 622; 51 A. 2d 292 (1947); *Erdman* v. *Horkheimer,* 169 Md. 204, 206, 207; 181 A. 221 (1935).

Article 1-A, Sec. 10, p. 197, Anno. Code of Maryland provides that the liability of an aircraft owner for

mid-air collision is to be determined by the law applicable to torts on land. Under this statute, the presumption of agency through ownership would apply to aircraft.

Here the jet aircraft involved was owned by the United States, was in the possession of McCoy, and was being piloted by him. Under the law of Maryland, the state where the airplanes collided and crashed, a presumption arises from those facts that McCoy was acting as an employee of the United States within the scope of his employment at the time of the occurrence.

Analgous to the contention of amici curiae on this point is the holding in *United States* v. *Baker,* 265 F. 2d 123 (1959); *Baker* v. *United States,* 97 U.S. App. D.C. 281, 230 F. 2d 831. The Court there said that the law of Virginia gave rise to the presumption that the serviceman driver was acting within the scope of his employment. The United States claimed this presumption had been rebutted by uncontradicted evidence, had therefore "dropped out of the case," and that once the presumption was removed, the testimony in the case was decisive on the issue of scope of employment. This court declined to so hold, stating that in reviewing the trial court's findings and conclusions, it would not be warranted to hold that the evidence relied upon by the government was uncontradicted and overcame the presumption that the serviceman driver was acting within the scope of his employment.

Although the presumptions of agency and scope of employment may be rebutted, the burden of overcoming it rests upon the defendant. Great weight attaches to these presumptions under Maryland law and the

evidence necessary to destroy the presumption "must be uncontradicted and conclusive." *Scott* v. *James Gibbons Co.*, 192 Md. 319, 64 A. 2d 117, 119 (1949).

In *Grier* v. *Rosenberg*, 213 Md. 248, 131 A. 2d 737 (1957), the Court said as follows:

> "In cases of this nature, after the plaintiff has offered proof of the ownership of the automobile in the defendant, if the defendant does not offer any evidence on the issue of agency, the Court should instruct the jury that if they find as a fact that the defendant owned the car, they must find that he is responsible for the negligence (if any) of the driver. If the defendant does present evidence to show that the alleged driver was engaged on business or a purpose of his own, it may be so slight that the Court will rule it is insufficient to be considered by the jury in rebuttal of the presumption, in which case the Court should grant the same instruction it would have granted if the defendant had offered no evidence on the issue. The evidence may be so conclusive that it shifts the burden or duty of going forward with the evidence back to the plaintiff, in which event the defendant would be entitled to a directed verdict, if the plaintiff does not produce evidence in reply, unless there is already evidence in the case tending to contradict defendant's evidence. *Erdman* v. *Horkheimer & Co., supra,* 169 Md. 207; 181 A. 221; *Fowser Fast Freight* v. *Simmont, supra,* 196 Md. 588; 78 A. 2d 178. The evidence, however, may fall between the two categories mentioned above, in which event the issue of agency should be submitted to the jury. Cf. 3 *Md. Law Rev.* 287, 288. It would be difficult, if not impossible, to lay down a rule, that would apply in all cases, as to when the evidence is so slight that it is insufficient to be considered by the jury in rebuttal of the presumption of agency, or so conclusive as to require a directed verdict for the defendant. These matters must

depend upon, and be decided by, the facts developed in each individual case."

The Government failed utterly to meet its burden of presenting evidence rebutting these presumptions. Instead, the evidence overwhelmingly supports the petitioners' position that at the time of the occurrence McCoy was acting as a civilian employee of the United States in the scope and course of his employment.

In the Meyer cases, the Court of Appeals examined the law of Maryland concerning the liability of a private person for the negligence of his agent and held that the decisive test for determining a master-servant relationship is the "right of control." The soundness of this interpretation of Maryland law can be seen from *Keitz, supra,* where the court said at page 491:

> ". . . it is not the manner in which the alleged master actually exercised his authority to control and direct the action of this servant which controls, but it is his *right* to do so that is important. *Sun Cab Co. v. Powell,* 196 Md. 572, 578 (1951); 77 A. 2d 783 . . ." (Emphasis in the original.)

The *Keitz* case enumerated the various elements which may be present in varying degrees where there is an employer-employee relationship, not all of these elements necessarily being present in each case. The court there said that those elements, some or all of which may be present where the employer-employee relationship exists, are: (1) the selection of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant, and (5) whether the work is part of the regular business of the employer. The element of paramount importance as stated by the court, is the fourth one mentioned,

the power to control the servant. To the same effect, see *Sun Cab Company* v. *Powell,* 196 Md. 572, 578, 77 A. 2d 783 (1951); *Charles Freeland and Sons, Inc.* v. *Couplin,* 211 Md. 160, 169, 170, 126 A. 2d 606 (1956).

Although all the elements enumerated in *Keitz, supra,* need not be present to create a fact question as to an agency relationship, it will be observed that all the elements mentioned in that case are present in the relationship between the federal government and caretakers employed to care for and maintain federal equipment. Federal law (32 U.S.C. § 709) specifically authorizes employment of the caretaker to maintain federal property and the statute provides he must be a "competent" person. The Department of the Air Force, by ANGR 40-01, § 3b expressly delegates the authority of federal officials (1) to employ caretakers, (2) to fix the rates of pay of caretakers, (3) to establish work hours, (4) to supervise caretakers, and (5) to discharge caretakers, all subject to law and to instructions which may be issued by the National Guard Bureau.

The Government admitted in its petition for the writ of certiorari in the Meyer cases that "the result reached by the Court of Appeals did not stem from any misapprehension as to State law" (Petn. 22).

Whether the United States had the "right to control" the action of McCoy at the time of the occurrence depends on the employment relationship that existed between McCoy and the United States at that time. To determine the nature of the employment relationship, it is necessary to examine ANGR 40-01 § 3(b), wherein the Department of the Air Force expressly delegates the authority of federal officials to supervise caretakers in the performance of their work, sub-

ject however to instructions that may be issued by the National Guard Bureau (R. 658).

The Federal government did not stop with its right to control McCoy in the performance of his civilian work. It actually exercised control over him.

National Guard Regulation No. 75-16 (NGR 75-16), entitled "Accounting Clerks and Caretakers" issued by order of the Secretary of the Army, through the National Guard Bureau on December 29, 1947 (Pltf's Ex. 15, R. 634-645), and ANGR 50-01, issued November 27, 1950 (Def's. Ex. 9, R. 671-677) disclose the detailed control which the United States exercised over caretakers employed under the authority of 32 U.S.C. Sec. 709, and the use of the Adjutants General of the State made by the Department of the Air Force, and by the Chief, National Guard Bureau to carry out Federal orders, directives, and procedures governing caretakers (Brief for the Respondent, No. 543, App. pp. 1a-3a, 21a). Any authority exercised over McCoy as a civilian maintenance supervisor stems from a direct delegation of authority by the Secretary of the Air Force. Col. Kilkowski, McCoy's immediate superior, was the Base Detachment Commander to whom the Adjutant General delegated the actual work of daily supervision of McCoy in his capacity as an air technician-caretaker, working in a supervisory maintenance position. McCoy's work was confined exclusively to Federally-owned equipment. And any authority or control exercised over him was in conformity with Federal directions and regulations issued by the Air Force and the National Guard Bureau. (Defendant's Exhibit 7, A.F.R. 45-2, 20a).

As was pointed out by the Court of Appeals in the Meyer cases, the functions lodged by the United States

in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto (Petn. for the Writ of Certiorari, Meyer cases, Appendix A, 7a).

Neither Judge Smith, nor Judge Hastie in his partially concurring opinion, mentioned or gave any consideration to these presumptions of agency and scope of employment which arise under the law of Maryland. Judge Hastie could not do so because he concluded, and amici curiae believe erroneously under the facts of the case, that it was not necessary to decide the first question, i.e., whether McCoy was an employee of the United States. If he had decided the first question, he could have given due weight to the presumption of agency, and then, in deciding the next question, scope of employment, he could have considered the presumption under local law that an employee is acting in the scope of his employment.

The Maryland cases with respect to agency and scope of employment relied on by the Court of Appeals, Third Circuit, are inapposite. They involve different factual situations. The master-servant relationship depends upon and must be decided by the facts developed in each individual case. None of the cases cited by the Third Circuit involve the operation of a motor vehicle owned by the defendant to be charged. Some of them did not involve motor vehicles at all. In none of them did the plaintiff have the presumptions to which the plaintiffs are entitled in this case under Maryland law. For instance, in *Henkelmann* v. *Metropolitan Life Insurance Co.*, 180 Md. 591, 26 A. 2d 418, cited by the Court, the defendant did not own the vehicle involved in the accident. The operator of the vehicle was employed by Metropoli-

tan as an insurance agent or salesman. He was free to select his own mode of transportation. The vehicle involved belonged to the wife of the operator. The operator was using the vehicle for his own personal convenience but was under no duty to use it and Metropolitan bore no part of the expense of operation or maintenance. The Court of Appeals of Maryland held that the operator was an independent contractor. The essential elements of choice and the lack of ownership of the vehicle present in Henkelmann are not present here. The other cases cited by the Third Circuit likewise are not pertinent. *Lewis* v. *Accelerated Transport-Pony Express, Inc.*, 148 A. 2d 783 (1959) involved an action for slander. *Globe Indemnity Company* v. *Victill Corp.*, 119 A. 2d 423, 427 (1956) involved an action for assault. *Eyerly* v. *Baker*, 178 A. 691, 696 (1935) involved a customer in a store who was injured by a revolving door put in motion by a salesperson who was returning to work. The salesperson's employment imposed no duty on her with respect to the operation or control of the door which caused the injury. In *Greer Lines Co.* v. *Roberts*, 139 A. 2d 235, 239 (1958), Greer left his motor vehicle with a repairman to be repaired. The negligence of the repairman caused the plaintiff's injuries. In *Gallagher's Estate* v. *Battle*, 122 A. 2d 93, 98 (1956), defendant, Gallagher, was not the owner of the vehicle involved in the accident. The vehicle had been leased from another and the lease—a one-trip lease—had expired at the time of the accident. In *Victill*, supra, at page 583, the Court of Appeals of Maryland quoted with approval from *Mechem* Outlines of Agency, 4th Edison, Sec. 446, where it was said "Were the saleman driving his employer's car, the inference of control would be strong and he would likely be held a servant". Thus, it will be seen

that the Maryland Court realizes that where the vehicle is owned by an employer, a different conclusion is not only warranted but required if there is no evidence to rebut the presumption arising from such ownership.

A majority of the court in the Third Circuit did not pass on the question whether civilian caretakers of federal property allocated to National Guard units are employees of the United States. Judge Smith, who wrote the opinion for the Court, held persons so employed were not employees of the United States. Judge Hastie (329 F. 2d 732) stated that he was not expressing any opinion on that subject. Judge Staley, dissenting, expressly held that civilian caretakers employed under 32 U.S.C. 709(a) to care for the material, armament and equipment of the Federal Government allocated to the National Guard units are employees of the United States. Judge Smith therefore was the only member of the Court who decided to overturn the findings of fact by Judge Gourley on this point.

Judge Gourley, by agreement of the parties, had tried the *Levin* and *Johns* cases on the record made in the trial of the *Meyer* cases in the United States District Court for the District of Columbia. Judge Matthews of that Court did see and hear "live" witnesses on the agency issue. Judge Smith held that Rule 52(a) of the Federal Rules of Civil Procedure was not applicable under the circumstances and that the findings of the trial judge "need not be given the weight usually accorded them under the rule," and that the Court of Appeals was "in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal."

It is believed this was a misinterpretation of Rule 52(a). In disregarding Judge Gourley's findings of fact, Judge Smith was, in effect, as the present posture of the *Meyer* cases demonstrates, also attacking or jeopardizing the findings of fact made by Judge Matthews who did see and hear the witnesses. The view that several courts have taken that Rule 52(a) has limited application where the case is tried on stipulated facts and documentary material, and where there is no conflict in the evidence or the inferences which can reasonably be drawn therefrom, *United States* v. *Mississippi Valley Barge Line Co.*, 285 F. 2d 381, 388 (8th Cir., 1960), should not be extended to a situation such as was presented here. Otherwise one court of appeals (the District of Columbia Circuit) is governed by Rule 52(a) and gives due weight to the findings of fact, while another circuit (the Third) is not governed by Rule 52(a) and gives little or no weight to substantially the same findings of fact by a trial court made at a subsequent time based on the identical evidence received in the prior trial.

If Rule 52(a) has little or no effect when a case is tried on a record of proceedings from a prior trial, no litigant will be willing to go through such a trial. If he prevails in the trial court, he will know that it will carry minimal weight with the reviewing court. There will be no point in stipulating to trying the case on the prior record on the theory it will save time and expense for all concerned. The trial judge will be reluctant to undertake a trial where his patient and thorough examination of the evidence, and making of findings of fact, may constitute an exercise in futility because the reviewing court can treat his findings for naught.

A. Admissions Made by the United States Subsequent to the Occurrence Supporting the Conclusion That McCoy Was An Employee of the United States and Acting in the Scope of His Employment

Following the accident there were admissions and affirmative acts of authorized employees of the United States confirming the fact that McCoy was acting in his capacity as an employee of the Federal Government at the time of the accident.

The certificate prepared by Col. Ebaugh is an admission against interest on the part of the United States. *Chicago* v. *Greer,* 9 Wall 726, 19 L.ed. 769 (1870), 20 Am. Jur., *Evidence* Sec. 603, p. 516 (perm. ed. 1939). Col. Ebaugh, in certifying McCoy was an employee of the United States at the time of the occurrence, was acting in an authorized capacity in the discharge of his official duties (R. 276); therefore, his certificate is an admission by the United States.

The fact that the United States took an assignment from McCoy is also further evidence that he was an employee of the Government at the time of the occurrence. *Pittsburg Construction Co.* v. *Gannon,* 46 U.S. App. D.C. 131 (1917).

It is clear from the foregoing authorities that the certification of Col. Ebaugh as to McCoy's status at the time of the occurrence, the subsequent payment of compensation benefits to McCoy, and the assignment taken by the United States from McCoy, all must be taken as evidence tending to show that McCoy was an employee of the United States at the time of the occurrence. Evidence of each of these acts of the Government was admissible both as an admission and as a record made in the normal course of business.

IV. THE UNITED STATES IS LIABLE FOR THE NEGLIGENCE OF McCOY EVEN IF HE WERE WORKING NOT AS A CARETAKER AND IF HE WERE PERFORMING SOLELY MILITARY WORK AS A "MEMBER" OF THE MARYLAND AIR NATIONAL GUARD

It is believed the Court need not reach the question whether the United States would be liable for the negligence of McCoy if he were acting solely in a military capacity doing only military work as a "member" of the Maryland Air National Guard. The evidence demonstrates that McCoy was engaged in whole or in part in the performance of his civilian work at the time of the occurrence. The Government conceded in the Meyer cases that McCoy was acting at least in part in his civilian capacity at the time of the occurrence (Appellants' Brief, Court of Appeals for the District of Columbia Circuit, Cases 16953; 16954; 16955, p. 16) and even if the conclusion were reached that McCoy in some limited sense was performing military duties as well as carrying out the duties of his civilian job at the time of the occurrence, the Government would not be relieved from liability in this case. And while amici curiae submits there is no substantial basis under the evidence for the holding of the 3rd Circuit that McCoy was acting as a "member" of the National Guard, and working solely in a military capacity at the time of the occurrence, nevertheless, even if the evidence had so shown, the Government should be held responsible for his acts because of the dual role and relationship McCoy occupied with respect to both the federal and state governments while performing solely military duties as a member of the National Guard, and because of the right and power of the federal government to control his flying activities, including the use of its plane, its fuel, in the flying area it specified, under Air Force Regulations with which McCoy was compelled to comply.

In *Layne* v. *United States,* 295 F. 2d 433 (7th Cir. 1961), cert, den. 368 U.S. 990, it was held that a "member" of the National Guard, not a caretaker, killed while solely on a military training mission as part of a unit which has not been activated, was an employee of the United States. Recovery of damages for the death of Major Layne, the guardsman, in a suit based upon the FTCA was denied on the authority of *Feres* v. *United States,* 340 U.S. 135 (1950), where it was held that a serviceman cannot recover damages for injuries, incident to the service. The trial court in the *Layne* case, 190 F. Supp. 532 (So. Dist. Ind. 1961) held that Major Layne had a dual legal relationship to the United States and to the State of Indiana when killed, and that he was in the service of the United States as well as the State of Indiana, when on the training flight; that it could not be said that he was not in the service of the United States because of the term "inactive" service. The court further stated, p. 536:

> "It is possible, depending on the facts, for a guardsman to be performing several duties for both the state and the National Governments, the joint performance of which may be the proximate cause of an incident injuring another in which event both State and Nation would be liable, if immunity had been waived. . . ."

The court emphasized the fact that Layne was operating a jet plane of the United States, had a direct duty to the United States of America to safeguard the plane, and was performing service for the United States in a military status while executing commands of the State of Indiana. The court pointed out, as the claimants in this case have contended throughout that, p. 538:

> "It is unreasonable to suggest that the training of a jet aircraft pilot, . . . or the use of the jet aircraft in question, would be useful to the accomplishment of any mission for the State of Indiana. . . . The training flight of Major Layne involved a distinct relationship with and performance of a duty to the United States of America."

Secretary of the Army Brucker, on May 10, 1960, advised the Committee on the Judiciary of the House of Representaives, H. Rept. 1928, 86th Cong., 2d Sess., p. 7:

> "Equipment such as jet aircraft, tanks, and heavy artillery, . . . would seldom if ever be used in accomplishing a State mission."

There must always of necessity be a considerable measure of federal control over Air National Guard units. When the Air National Guard was established, it was done within a framework similar to the Army National Guard, even though there was no genuine connection or relationship between high speed jet aircraft and a state mission. But the courts have always looked to the substance rather than allowing form to cloak reality. If, in fact, federal support were to be withdrawn from the various Air National Guard units, it would mean no federal pay, no airplanes, no fuel, no hangars, no runways, no maintenance mechanics (air technicians), no parts for replacement, no medical care or sickness or death benefits. It would mean no Air National Guard.

We are not unmindful of the fact that various district courts and courts of appeal have held that military members of non-activated National Guard units are employees of the state and not the federal government. In so holding in *Stoner* v. *U.S.*, 251 F. 2d 268

(5th Cir.), cert. den. 356 U.S. 951 (1958), the court observed that so far as holding "members" of the National Guard are federal employees, p. 269:

> "If a proposition so firmly established is to be changed, we think that should be done only by the Supreme Court, and that we should abide by our former decisions."

When the vast scope and extent of federal control over an Air National Guard unit is considered, together with the fact that the daily training area of the unit usually covers several states,[1] that all its equipment is federally owned and federally maintained, that the airplanes it operates travel 400 to 500 miles an hour and in a few minutes time pass over several state boundaries, that these airplanes must be operated and maintained so that in the first hour, in case of emergency, fifty percent of its aircraft must be able to get up in the air fully armed, so as to become an effective and integral part of our nation's first line of defense against foreign attack, 32 U.S.C. § 102, that the Pentagon is now directing that all our military reserve forces be made a part of the National Guard, it is believed that a fresh look should be taken at this whole matter of the status and relationship of a "member" of the Air National Guard to the federal government even when a member of a unit which has not

[1] The Air National Guard operates at large without regard to state boundaries. According to Standing Operating Procedure No. 3, promulgated January 2, 1957, (Defendant's Ex. 3, R. 663-664), the local flying area for the 104th Fighter Interceptor Squadron over which flights were made daily by the squadron McCoy was a member of, included the States of Maryland, Pennsylvania, New Jersey, Delaware and Virginia. The squadron's over-all training area was considered to be in the continental United States. (R. 690).

been "activated," and that it should be held that the member occupies such a dual relationship with the federal as well as the state government that he is an employee of the federal government within the meaning of the Federal Tort Claims Act even when functioning solely as a "member" of a non-activated Guard unit in the course of training.

Congress itself, in the National Guard Act, 32 U.S.C. § 102, describes the Air National Guard as "an integral part of the first line defenses of the United States * * *," the strength and organization of which must be maintained and assured at all times.

And further illustrative of the close federal connection with and control over the Air National Guard is the provision in 32 U.S.C. § 110, that the President shall prescribe regulations, and issue orders necessary to organize, discipline and govern the National Guard.

The notion that members of the National Guard are in no way employees of the United States when the unit has not actually been "activated", disregards the realities of federal supervision and control, and the right of federal supervision and control over virtually all National Guard activities in order that the first line defenses of the United States be maintained and assured at all times.

McCoy was not acting as a military member of the Guard performing military duties at the time of the occurrence. He was acting in the capacity of and doing the working of a supervisory air technician—civilian caretaker of federal airplanes. General Wilson, in charge of the Air National Guard, on active federal duty at the Pentagon, testified that it is desirable that the maintenance officers fly the airplanes

maintained by them and under their supervision to let the others who will fly the planes know the planes are being properly maintained. Of course, this was the only way that the quality of maintenance could ultimately be ascertained, by operating and flying the machines which the federal maintenance personnel were maintaining. But even if McCoy had been acting solely in a military capacity, doing military work at the time of the occurrence, as the 3rd Circuit held, it is submitted that then, under the very broad definition of "employees of the Government", in the Federal Tort Claims Act, 28 U.S.C. § 2671, McCoy should be considered an employee of the United States. Amici curiae do not wish it to be considered, by reason of their argument that McCoy was a federal employee even if only acting as a military member of the Air National Guard, that they adopt the view that McCoy was acting solely in a military capacity. He was not so acting. The evidence supporting the findings of fact of the trial court, and the findings of the trial court, demonstrate that McCoy was acting solely or at least in part in a civilian capacity doing civilian work when injured. However, amici curiae believe the decisions that have held that members of non-activated units of the National Guard, acting in a military capacity were solely employees of the state, have reached a conclusion that does not truly take into account the actual relationship which exists.

CONCLUSION

Both trial courts found that McCoy was actually performing the duties incident to his "civilian caretaker status" at the time of the occurrence. The Court of Appeals for the District of Columbia Circuit affirmed this finding in the Meyer cases, stating, ". . .

in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident. . . ." The Court of Appeals in that case further held that the flight in question by McCoy "entailed the performance of his caretaker and maintenance duties" and, in the performance of "his property maintenance function . . . the ultimate right of control over him was in the United States."

The accident occurred both within the time and geographic area of McCoy's employment by the United States as a caretaker. He was operating a vehicle owned, maintained and fueled by the United States and was performing an important duty imposed by his employment as a caretaker for the benefit of the United States at the time and place of the collision between the Viscount Airliner and the T-33 Jet.

Finally, the Government admitted in the Meyer cases that McCoy was, at least in part, acting in his civilian capacity at the time of the occurrence. (Brief, Court of Appeals for the District of Columbia Cir., p. 16).

The United States, if a private person, would have been liable under the law of Maryland for injury or death caused by the negligence of McCoy at the time of the occurrence. It is liable for his act, on the basis of that test, under the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

Respectfully submitted,

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